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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Appellant,

v.

DAVID MARTIN SHAW, SR.,

Defendant and Respondent.

C037793

(Super. Ct. No. CRF99538)

A jury convicted defendant David Martin Shaw, Sr., of kidnapping with intent to commit rape (Pen. Code, §§ 209, subd. (b)(1), 667.8, subd. (a); undesignated section references are to this code), forcible rape during commission of a burglary (§§ 261, subd. (a)(2), 667.61, subds. (a), (b)), attempted murder (§§ 664/187), assault with intent to commit rape (§ 220), second degree burglary (§ 459), assault with force likely to cause great bodily injury (§ 245, subd. (a)(1)), and criminal threats (§ 422).

With substitute counsel, defendant filed a motion for a new trial on the ground of ineffective assistance of trial counsel.

The trial court found that trial counsel's performance was deficient in that he failed to retain and/or call a forensic expert to testify concerning the effects of drug and alcohol on the victim's ability to perceive, recollect, and report. Finding prejudice, the trial court granted the motion for a new trial.

The People appeal from the order granting defendant's new trial motion (§ 1238, subd. (a)(3)), contending the trial court abused its discretion in that insufficient evidence supports the trial court's finding of prejudice. We will reverse the order granting the new trial motion.

FACTS

The victim, Sherrie L., met defendant outside a bar sometime after closing and asked him for a cigarette. Defendant was drinking hard liquor and offered her some, which she declined. Earlier, about 8:00 or 9:00 p.m., the victim had had two glasses of wine. The victim and defendant were joined by two others, David R. and Bobbi C. The foursome left the area seeking a place to use methamphetamine. Along the way, defendant intimidated a person who had approached the group asking for a cigarette. Also along the way, defendant and David talked about having robbed and beaten a person the previous night. Hearing the conversation, the victim was frightened. While walking, defendant told the victim, "'You know what I want.'" Assuming defendant was proposing sex in exchange for drugs, the victim declined. Defendant said, "'We'll see.'" After defendant and David obtained narcotics from someone behind

a residence, David and Bobbi decided to leave. The victim did not want to remain with defendant but Bobbi told her she would be fine.

The victim followed defendant. When they reached some buildings, defendant wanted to go in a vacant building and use drugs but the victim declined to go inside. Defendant physically forced her to go inside a shed and once inside, tripped her. She fell and defendant landed on top, pinning her to the floor. He told her to take her pantyhose down and that they "were going to have sex." She wanted to use drugs first but defendant refused although he forced her to hold the wrapper with the drugs. Defendant proceeded to rape the victim. She asked defendant if he just liked having sex. Defendant became so angry he hit her face and threatened to sodomize and kill her. The victim started crying and defendant choked her until she was unconscious. When she regained consciousness, she started struggling thinking he was still choking her but he was gone.¹

The victim fled the building, flagged down a truck, and went to the police station. About 4:00 or 4:30 a.m., the victim reported to an officer that she had been raped. The dispatcher and an officer described the victim as visibly shaken and crying. The victim feared being alone. The victim guided

¹ When interviewed by officers, the victim claimed that when she regained consciousness, defendant was still in the shed and that she fought with him, scratching and hitting him, before she fled. She also did not mention anything about drugs.

the officer to the shed where the rape occurred. Inside, the officer found the victim's purse, shoes, and a disposable cigarette lighter. Later, another officer located one of the victim's missing false fingernails.

The victim had red marks around her neck. At the hospital, the victim was close to shock. A sexual assault examination revealed a "small linear tear in the area of the posterior fourchette, the lower portion of the vagina" which occurred within 12 to 24 hours. The examiner opined that the injury was consistent with nonconsensual sexual intercourse. The victim also had a "pink area on the cervical mucosa," an "abnormal finding" and indicated "recent trauma."

The parties stipulated that defendant did not have the owner's consent to enter the shed. When defendant was arrested and interviewed, he admitted meeting the victim, walking around with the victim and another couple, going into the shed, and having sexual intercourse with the victim who he described as a "bar fly or a hooker." He claimed that he had consensual intercourse with the victim for which he paid \$20. He denied that there had been a struggle, that he had choked the victim, or that he had threatened to kill the victim. After sexual intercourse, he left and the victim smoked what he thought was an illegal substance.

Defendant did not testify at trial. Called by the defense, Bobbi admitted having walked around with the victim, David, and defendant to find a place for defendant and the victim to stay. Bobbi and the victim waited in front of a house while David and

defendant went behind the house. The victim waited in front of the house alone while Bobbi went behind the house as well. Bobbi denied telling the victim that she would be safe with defendant. Bobbi did not recall an incident where someone asked for a cigarette. Bobbi did not overhear defendant and David talking about beating another person the previous night. Bobbi pays no attention to conversations that do not involve her.

Defendant's friend, Brooke B., noticed no scratches or bruises on defendant's body on the day he was arrested. Brooke had declined defendant's invitation for a date the evening prior to the incident.

The victim's acquaintance after-the-fact, Jason T., tried to convince the victim to change her story because he did not want to see anyone convicted of rape. Jason told a defense investigator that the victim claimed she agreed to exchange sex for drugs and had consented to sexual intercourse but that it "got weird."

DISCUSSION

The People contend that the trial court erred as a matter of law in granting defendant's new trial motion because there was no evidence presented by the defendant demonstrating a reasonable probability of a more favorable outcome at trial had trial counsel obtained a drug expert to testify. We agree because there was no evidence presented that a test of the victim's blood would have led to results from which an expert would have testified. Moreover, even assuming methamphetamine was present in her blood, there was no showing of prejudice.

Background

According to defendant's new trial motion and defendant's trial counsel, a police report reflects that the victim's blood was drawn at 8:00 a.m. She had a blood-alcohol content of .02 percent. Her blood was not tested for controlled substances. During the victim's interview with an officer, she admitted having used methamphetamine earlier in the day, prior to the incident.

Prior to trial, defendant's trial counsel sought to admit evidence that the victim had used methamphetamine at some unspecified time on the day of the incident and that she was a regular user. The trial court advised that the evidence would be admitted if the defense planned to call a drug expert to testify about the effects of methamphetamine on a person's ability to perceive, recall, or recollect. Trial counsel did not state that he had any plans to call a drug expert. The trial court excluded any mention of the victim's use of methamphetamine.

After the jury convicted defendant on all counts, defendant, with new counsel, moved for a new trial on the ground of ineffective assistance of counsel arguing, inter alia, trial counsel failed to employ a forensic alcohol/drug expert to analyze the victim's blood to determine the amount of methamphetamine in her blood, to testify as to her blood-alcohol content five or six hours prior to it testing .02 percent, and to testify as to the effects of methamphetamine and alcohol, that is, hallucinations, confusion, and hysteria. Defendant

argued such evidence "would go directly to the alleged victim's ability to perceive, recollect and remember the events on the night in question" and "could also explain some of the hysteria and fear displayed by the victim while in the safe confines of the [p]olice [d]epartment itself."

In support of his claim, defendant submitted the declaration of Justin Birnbaum and William Giguere with Park-Gilman Clinics in Burlingame (defense experts). The defense experts stated that they had reviewed the supplemental police report indicating that the victim's blood-alcohol content was .02 percent and that she denied smoking a controlled substance in front of defendant. They opined that a toxicological evaluation of the victim for alcohol and drugs "could be of critical importance in evaluating the accuracy of the victim's recollection of the events relating to the incident" because methamphetamine and/or alcohol "have the potential to impact both the Central Nervous System (CNS) and the Autonomic Nervous System (ANS)."

The defense experts noted that "[c]linical doses of 10 mg of methamphetamine typically produces a concentration of approximately 0.50 - 4.0 mg/L in the *urine*. These levels are typically seen during the first 24 hours after ingestion. At this level, the stimulant effects may produce elevated heart rate, increased cardiac output, an increase in blood pressure, slight nervousness and alertness." (Italics added.)

The defense experts cited publications on the subject of amphetamine related psychotic reactions noting the similarities

between schizophrenia and symptoms displayed by amphetamine abusers. "Without developing psychosis, amphetamine users may be restless, tense and fearful. Some develop delusions of persecution. They may have auditory, tactile and visual hallucinations. Strangely, most are not disoriented and will act appropriately, given their paranoid state. Generally, all of these symptoms disappear within a day or two of abstinence, although marked depression may persist."

Admitting that "interpretation of methamphetamine concentrations is not a straight forward task," the defense experts commented that the "effects usually only last between 4-6 hours, yet the drug will be excreted in the *urine* for greater than 24 hours." (*Italics added.*) Because the victim had a blood-alcohol content (BAC) of "0.02 % at approximately 7:00 to 8:00 AM", the defense experts opined that the victim's BAC at "2:00 AM was approximately 0.12% to 0.14%." Based on this assumption, they further opined, "A person at such a BAC combined with an unknown quantity of methamphetamine in their system is likely to exhibit overconfidence which would manifest itself in an increase in risk taking behavior. Also apparent would be a decline in information processing abilities, diminution of attention, judgement and self-control." Citing a 1995 study, the defense experts claimed that "[m]ethamphetamine reversed the subjective sedation produced by alcohol, yet the combination of the two agents resulted in a greater perceived state of intoxication." In conclusion, the defense experts stated, "The specific impairment(s) of the victim in this

case is impossible to assess on the basis of the paucity of information in the report provided."

At trial, the nurse who examined the victim at the hospital testified that a urine sample was not taken.

At the hearing on the new trial motion, trial counsel testified. He admitted he had been aware of the victim's statement that earlier in the day she had ingested an unspecified amount of methamphetamine at some unspecified time prior to meeting defendant. Although aware that the victim's blood had been drawn at 8:00 a.m., trial counsel admitted having not sought testing for the presence of methamphetamine. He explained that defendant had admitted having sexual intercourse with the victim and that the issue was consent. Assuming the results showed she was "whacked out" on drugs and alcohol, trial counsel thought she would not be able to give consent and defendant might be charged with another crime, that is, having sexual intercourse with an unconscious person. He claimed he consulted with an alcohol forensic expert. Trial counsel also testified that the photograph of the scene showed the bag of the controlled substance on the floor.

A forensic toxicologist, testifying for the prosecution at the hearing, noted that the effects of methamphetamine are generally present four to six hours after the drug enters the bloodstream and dissipate in about eight hours. Symptoms include dilated eyes, increased heart rate/pulse rate, urine retention, dry mouth, slurred speech, talkative, and shaking. According to hospital records, the victim's blood pressure was

"132 over 88," a little above normal, the victim's eyes were described as spontaneous, orientated, and obey commands and there was no indication of an elevated pulse rate. The toxicologist opined that the victim displayed no effects of methamphetamine.

Although defendant argued that had the victim's blood been tested an expert could have testified favorably at trial as to the effects of methamphetamine and alcohol, defendant did not seek to admit any test results of the victim's blood in support of his new trial motion. The prosecutor challenged defendant's evidentiary showing as inadequate arguing that the opinion of defendant's experts required a positive test result for methamphetamine and that defendant had failed to provide any blood test results. Without such results, the prosecutor argued, there could be no showing of prejudice, that is, no basis for concluding a different outcome was reasonably probable on retrial.

Concluding that trial counsel failed to retain and/or call a forensic expert concerning the effects of alcohol and methamphetamine ingestion and such failure was prejudicial to defendant, the trial court granted defendant's new trial motion.

Standard of Review

A criminal defendant has the right to the assistance of counsel under the federal and state Constitutions (U.S. Const., Amend. VI; Cal. Const., art. I, § 15). In order to protect a defendant's fundamental right to a fair trial, a defendant's right to the assistance of counsel "entitles the defendant not

to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215, italics in original.) "Under this right, the defendant can reasonably expect that in the course of representation his counsel will undertake only those actions that a reasonably competent attorney would undertake. But he can also reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. [Citations.] If counsel fails to make such a decision, his action--no matter how unobjectionable in the abstract--is professionally deficient. [Citations.]" (*Ibid.*)

Although not a statutory ground for a motion for a new trial (§ 1181), trial counsel's ineffectiveness is a nonstatutory ground for such a motion. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583.)

A trial court has broad discretion in ruling on a new trial motion and its ruling will not be disturbed on appeal "'unless a manifest and unmistakable abuse of discretion clearly appears.'" (*People v. Williams* (1988) 45 Cal.3d 1268, 1318.) This standard of review is applicable to a statutory new trial motion. A two-step process akin to that used in reviewing a ruling on a suppression motion applies to a nonstatutory new trial motion on the ground of ineffective assistance of counsel. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724.)

In the first step, the trial court finds the relevant facts. "On appeal, all presumptions favor the trial court's

exercise of its power to judge the credibility of witnesses, resolve any conflicts in testimony, weigh the evidence, and draw factual inferences." (*People v. Taylor, supra*, 162 Cal.App.3d at p. 724.) The trial court's findings of fact, express or implied and supported by substantial evidence, will be upheld on appeal. (*Ibid.*, citing *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

In the second step, the trial court decides based on the facts found whether defendant has demonstrated that counsel's performance was deficient and that defendant suffered prejudice as a result, both being mixed questions of fact and law. (*People v. Taylor, supra*, 162 Cal.App.3d at pp. 724-725; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-698 [80 L.Ed.2d 674, 693-700]; *People v. Ledesma, supra*, 43 Cal.3d at pp. 216-218.) "To the extent that these are questions of law, the appellate court is not bound by the substantial evidence rule, but has 'the ultimate responsibility . . . to measure the facts, as found by the trier, against the constitutional standard" [Citation.] On that issue, in short, the appellate court exercises its independent judgment.' [Citations.]" (*People v. Taylor, supra*, at p. 725, quoting *People v. Leyba, supra*, 29 Cal.3d at p. 597, fn. omitted.)

The defendant has the burden of proving counsel's performance was deficient under an objective standard of professional reasonableness and prejudice under a reasonable probability of a different outcome test. (*Strickland v. Washington, supra*, 466 U.S. at pp. 687-698 [80 L.Ed.2d at

pp. 693-700]; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 216-218; *People v. Taylor*, *supra*, 162 Cal.App.3d at pp. 724-725.) To prove prejudice, defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, at p. 694 [80 L.Ed.2d at p. 698]; see also *People v. Ledesma*, *supra*, at pp. 217-218.)

In other words, a defendant must "show us what the trial would have been like, had he been competently represented, so we can compare that with the trial that actually occurred and determine whether it is reasonably probable that the result would have been different." (*In re Fields* (1990) 51 Cal.3d 1063, 1071 [habeas corpus petition alleged trial counsel's incompetent investigation or presentation of evidence]; see also *People v. Beeler* (1995) 9 Cal.4th 953, 1008 [defendant's claim that counsel should have obtained an expert's opinion about defendant's organic brain damage rejected on appeal because the record did not establish in fact that defendant suffered from organic brain damage]; *In re Marquez* (1992) 1 Cal.4th 584, 604.)

Absent a demonstration of prejudice, we need not consider whether counsel's performance was deficient to reject defendant's claim of ineffective assistance of counsel. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697 [80 L.Ed.2d at p. 699]; *In re Alvernaz* (1992) 2 Cal.4th 924, 945.)

Analysis

Exercising our independent judgment, we conclude that defendant failed to show prejudice. Defendant failed to show that had counsel had the victim's blood tested it would have tested positive for methamphetamine. We reject defendant's assertion that "it was clear that the results would be positive for [methamphetamine]." There was evidence that at some unspecified time prior to meeting defendant, the victim ingested an unspecified amount of methamphetamine. There was also evidence that the victim's BAC at 8:00 a.m. was .02 percent. There was evidence that the victim consumed two glasses of wine at 8:00 or 9:00 p.m., and the evidence showed that the victim reported the rape at 4:00 or 4:30 a.m. The defense experts opined, that based on the presence of methamphetamine, in combination with a BAC of 12 to 14 percent at 2:00 a.m., the victim would exhibit "overconfidence," increased "risk taking behavior," decreased ability to process information, and "diminution of attention, judgement and self-control." The defense experts cited clinical studies of methamphetamine use as evidenced by *urine* samples. Here, the nurse who examined the victim testified no urine sample was taken. There was no evidence how long methamphetamine can be detected in the blood. Further, the prosecutor's forensic toxicologist opined that based on his review of the hospital records, the victim displayed no effects of methamphetamine use. Further, there was no evidence the victim consumed alcohol up until 2:00 a.m. in an amount sufficient to raise her BAC to 12 to 14 percent. Absent

a positive test result for methamphetamine, the defense experts' opinions are meaningless. "Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.'

[Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Much of the experts' opinions were based on assumptions, not facts. Thus, defendant failed to show what the trial would have been like with a positive methamphetamine test result and expert opinion. Because the trial court could not compare a hypothetical trial with the trial that occurred, it could not determine prejudice was established.

Moreover, even assuming methamphetamine was present in the victim's blood, there is no showing of prejudice. The victim's recollection of the event was substantially confirmed by defendant's admissions and Bobbi C.'s testimony at trial. The victim's story about walking around with defendant, David, and Bobbi and many of the specifics of their travels was confirmed by Bobbi. Bobbi also confirmed that when she and David left, the victim and defendant were alone. Defendant admitted to an officer that he met the victim and walked around with her and another couple. Defendant admitted that he and the victim went into the shed and had sexual intercourse. The only issue at trial was consent. The victim claimed he forced her into the shed and forced her to have sex while he claimed he paid \$20. The victim claimed he choked her; he denied the same. The

physical evidence supported the victim's testimony. The sexual assault exam revealed a tear and recent trauma consistent with nonconsensual sexual intercourse. Also the victim had red marks around her neck unexplained by the defense.

The trial court erred in finding prejudice. We need not consider whether counsel's performance was deficient. The trial court abused its discretion in granting the new trial motion.

DISPOSITION

The order is reversed. The matter is remanded to the trial court with instructions to enter an order denying the new trial motion, to reinstate defendant's convictions, and to impose sentence.

CALLAHAN, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.